IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated.: 22.11.2006

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.1155 of 2006

Rajeswari .. Appellant/Plaintiff

-Vs-

Sivakozhundhu .. Respondent/Defendant

The Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.09.2003 made in A.S.No.168 of 2002 on the file of the Principal District Judge, Cuddalore District, Cuddalore and reversing the judgment and decree dated 19.11.2002 made in O.S.No.566 of 2000 on the file of the Principal District Munsif Court, Cuddalore.

For Appellant : Mr. P.Athiveera Ramapandian, for
Mr. S.Sinthana Devi.

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J U D G M E N T

The plaintiff in O.S.No.566 of 2000 on the file of the Principal District Munsif Court, Cuddalore who has lost before both the Courts below has filed the above second appeal.

2. For the sake of convenience, the parties are referred to as they are arrayed in the suit.

3. It is the case of the plaintiff that the defendant executed an agreement of sale dated 07.06.1999 agreeing to sell the suit property to the plaintiff for a sale consideration of Rs.23,250/-; Rs.22,250/- was paid as advance and the balance was to be paid at the time of execution of sale deed; the plaintiff was put in possession of the suit property and since the defendant refused to execute the sale deed, the suit has been filed for specific performance.

4. The defendant contested the suit inter-alia contending that the suit sale agreement is a forged one; the plaintiff is not in possession of the suit property; the suit property has been leased out to one Ganesh for running a Hotel; earlier the plaintiff filed a

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suit in O.S.No.171 of 1996 against the defendant for injunction in respect of the same property on the basis of a sale agreement dated 19.07.1980, but the suit was dismissed by the Additional District Munsif Court, Cuddalore, by its judgment dated 30.04.1998. It was further contended that a Review Petition filed along with a petition in I.A.No.273 of 1999 under Section 5 of the Limitation Act to condone the delay was also dismissed for default on 06.08.1999 and though the said I.A. was subsequently restored, it was again dismissed for default on 28.07.2000. The defendant further contended that in such circumstances the alleged sale agreement dated 07.06.1999 is not true and the suit is barred by res judicata in view of the dismissal of the suit in O.S.No.171 of 1996 and there is no cause of action for the suit and on these defence the defendant sought for dismissal of the suit.

5. After framing appropriate issues, the suit was taken up for trial and during trial the plaintiff's husband was examined as P.W.1, the attestor and scribe of the sale agreement were examined as P.Ws.2 and 3 and the Advocate Commissioner was examined as P.W.4 on the side of the plaintiff. On the side of the defendant, the defendant was examined as D.W.1 and Exs.B-1 to B-4 have been marked. The Advocate Commissioner's report and plan have been marked as Exs.C-1 and C-2.

6. On a consideration of the evidence on record the trial court holding that Ex.A-1-sale agreement is true and genuine decreed the suit. Being aggrieved by that the defendant filed an appeal in A.S.No.168 of 2002 before the Principal District Judge, Cuddalore. The Lower Appellate Court allowed the appeal and set-aside the judgment and decree of the trial court. Being aggrieved by that the plaintiff has filed the above second appeal.

7. The learned counsel for the appellant submitted that the trial court on a comparison of the signature found in Ex.A-1- with the admitted signature of the defendant contained in Vakalat and summon and on a consideration of the oral evidence of P.Ws.1 to 3 had come to the conclusion that the agreement of sale was executed by the defendant, but the Lower Appellate Court has erroneously held that the Trial Court should ought not to have compared the signature found in Ex.A-1 with the admitted signature of the defendant found in the vakalat and summons. The learned counsel further submitted that though in the plaint it has not been specifically averred that the plaintiff is always ready and willing to perform his part of the contract, a reading of the plaint as a whole will show that the plaintiff was always ready and willing to perform his part of the contract, but the lower appellate court has not considered the same. The learned counsel further submitted that the defendant had not taken any steps to compare the signature in Ex.A-1 with his admitted signature by an expert.

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8. I have carefully considered the submissions of the learned counsel for the appellant and the judgments of the Courts below. The trial court has itself compared the disputed signature in Ex.A-1-sale agreement with the admitted signature of the defendant contained in the vakalat and summon. Admittedly in the vakalat, summons, written statement and his deposition the defendant has signed in Tamil but has put his initial, that is, 'M' in English, but in Ex.A-1 the signature is in English. But yet the trial court has compared the signature and observed that initial 'M' appears to be similar. The trial court has also observed that when the defendant had denied his signature in Ex.A-1, he should have sent the disputed signature for the opinion of an expert but the defendant has not discharged that burden. The above said procedure followed by the trial court is contrary to the well settled principles of law. A Division Bench of this Court in the decision reported in 2006 (3) C.T.C. 39 (Central Bank of India Vs. Antony Hardware Mart) has held that the disputed signature could be compared with admitted signature, which was contemporaneous and not with the admitted signatures obtained subsequent to the date of the disputed signature. In the same decision, the Division Bench has observed that though normally the Court should not taken upon itself the responsibility of comparing the disputed signature with that of the admitted signature, undoubtedly the Court is competent to compare the disputed signature with the admitted signature in view of Section 73 of the Evidence Act and has further observed however that, if the Court has any doubt, it is incumbent on it to leave the matter to the opinion of an expert. Therefore it has to be held that the trial court ought not to have compared the signature found in Ex.A-1 with the admitted signature of the defendant found in written statement, vakalat, etc., and therefore the procedure adopted by the trial court is not in accordance with law. The lower appellate court has rightly pointed out the above said error committed by the trial court.

9. The trial court accepted the evidence of P.Ws.1 to 3 without properly evaluating their testimony in the light of the pleadings in the case regarding the various litigations that were pending between the plaintiff and the defendant, the non-examination of the plaintiff and want of evidence to prove various amounts recited in Ex.A-1 that were said to have been paid over a period of 18 years. The lower appellate court has considered the above said aspects and has pointed out that when the parties were litigating in Courts with regard to the same property for more than two decades the execution of Ex.A-1 sale deed is highly doubtful. The lower appellate court has also pointed out that the plaintiff has not proved the passing of consideration under Ex.A-1-sale agreement by producing the discharged promissory note or by producing the receipts acknowledging payment.

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10. As rightly pointed out by the lower appellate court O.S. No.171 of 1996 filed by the plaintiff against the defendant was dismissed on 30.04.1998 I.A.No.273 of 1999 filed under Section 5 of the Limitation Act to condone the delay in filing the Review Petition to review the judgment dated 30.04.1998 was dismissed for default on 06.08.1999 and during the pendency of the Review Petition Ex.A-1-sale agreement has come into existence. If, as claimed by the plaintiff before the Court, the sale agreement was executed pursuant to a compromise deed after the disposal of the suit, O.S.No.171 of 1996 on 30.04.1998, the same could have been stated in the plaint but that has not been done so. The absence of such a pleading in the plaint is fatal to the case of the plaintiff. The lower appellate court has also pointed out that P.W.2, one of the attestors of Ex.A-1, is the friend of the plaintiff's son and has observed that a reading of P.W.2's deposition reveals that he does not know anything about Ex.A-1 except signing of the document. The reasons recorded by the lower appellate court for accepting the case of the defendant that Ex.A-1 is a forged one is based on legal evidence on record and no infirmity has been pointed out by the learned counsel for the appellant in the said reasonings.

11. The plaintiff has claimed that she was put in possession of the suit property pursuant to Ex.A-1-sale agreement. The lower appellate court has pointed out that the plaintiff has specifically pleaded that she was put in possession of the suit property ever since 1980 under a sale agreement dated 07.06.1979, but the suits in O.S.No.2411 of 1981 and O.S.No.171 of 1996 of specific performance and permanent injunction were dismissed and that itself will indicate that the plaintiff is not in possession of the suit property. The lower appellate court on a perusal of Ex.C-1-report and the evidence of P.W.4 has recorded a finding that the plaintiff is not in possession and in the suit property a building has been constructed and the same has been leased out to a person to run a hotel.

12. It is pertinent to point out that the plaintiff has come to the Court with a false case that she was put in possession of the suit property and when it is found that she was not in possession of the suit property, it has to be held that she has not come to Court with clean hands. In such circumstances, the Court should not exercise its discretion in favour of the plaintiff and grant the equitable relief of specific performance. In the decision reported in 1993 (2) M.L.J. 560 (Viswanathan and others Vs. R.Lakshmi Ammal (decd.) and others) a Division Bench of this Court has observed as follows:-

> "25. There is also another reason as to why we should not exercise our discretion and grant the equitable relief of specific performance in favour of the

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plaintiffs. They have come forward with a false case not only in the pleadings but also in the evidence. We have referred to the plea in paragraph 8 of the plaint that the lease in favour of the fifth plaintiff had come to an end on the execution of the agreements and no rent was payable after the date of agreement which clearly is a false plea".

13. The lower appellate court has also pointed out that there is no averment in the plaint as required under Section 16(c) of the Specific Relief Act stating that the plaintiff is always ready and willing to perform his part of the contract of sale. In the decision reported in 1993 (2) M.L.J. 560 (referred to supra) the Division bench has laid down as follows:-

"20. There is no averment in the plaint that the plaintiffs were always ready and willing to perform their part of the contract. The only averement is in paragraph 12 to which we have already made a reference. It is to the effect that the plaintiffs are ready and willing to deposit in the Court, the balance of the sale price, whenever called upon by the Court. That does not refer to the readiness and willingness of the plaintiffs before the filing of the suit. The plaintiffs have not deposited the amount in the Court at the time of filing the suit but they have merely averred that they were always ready to deposit the balance amount whenever called upon. Section 16 (c) of the Specific Relief Act provides that the specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. Order 6, Rule 3 of the Civil Procedure Code provides that the Form in Appendix-A when applicable shall be used for all pleadings. Form No.47 Appendix-A relates to a suit for specific performance. Paragraph 3 reads:

"The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice".

21. Thus, it is necessary for the plaintiffs not only to prove the readiness and willingness at the time of the suit, but the readiness and willingness through-out the period from the date of the contract. In fact, the Supreme Court in Sandhya Rani Vs. Sudha Rani, A.I.R. 1978 S.C. 537 : (1978) 2 S.C.C. 116: (1989) 1 S.C.J. 464 : (1978) 2 S.C.R. 839, has

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observed that it is incumbent upon the plaintiff to affirmatively establish that all throughout he or she, as the case may be, was willing to perform his or her part of the contract. Thus, in this case, there is no pleading that the plaintiffs were always ready and willing and there is no proof also to that effect".

In the light of the law laid down by the Division Bench, the contention of the learned counsel for the appellant is liable to be rejected.

14. Further it has to be pointed out that the trial court by recording a finding that Ex.A-1-sale agreement is true and the same was executed by the defendant has straight-away decreed the suit for specific performance without considering as to whether the plaintiff has come to the Court with clean hands, whether she was put in possession of the suit property as claimed by her, whether the plaintiff has averred in the plaint that she was always ready and willing to perform her part of the contract and whether the plaintiff was actually ready and willing to perform her part of the contract from the date of the sale agreement till the filing of the suit and when only a sum of Rs.1,000/- remained to be paid towards the sale consideration, why no time limit has been fixed in the sale agreement for execution of the sale deed etc., All these defects in the reasonings of the trial court have been pointed out by the lower appellate court and hence the lower appellate court has rightly interfered with the judgment and decree of the trial court.

15. In the considered view of this Court no question of law much less any substantial question of law arises for consideration in the above second appeal. For the reasons stated above, the second appeal fails and the same is dismissed. However, there will be no order as to costs.

srk

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.The Principal District Judge, Cuddalore District, Cuddalore
2.The Principal District Munsif Court, Cuddalore.
3.The Section officer, VR. Section, High Court, Madras.

ms (co)
dv/19.12.06

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